

V. SOME TANGENTIAL LEGAL MATTERS

Certain legal matters tangential to our investigation warrant brief discussion before we consider the events of May 13, 1985 and its aftermath.

The first significant matter relates to the legal concept of "taint," a doctrine governing the admissibility of certain evidence in criminal proceedings. We have been instructed on the case law which holds that statements made by any public employee, pursuant to a threat of dismissal from employment, are coerced and therefore cannot be used in any way in subsequent criminal proceedings against that employee. Under the law, the prohibition against the use of such compelled testimony and its fruits is broad. If, for example, a statement is found by a court to have been coerced, then, in order to proceed against the speaker, the prosecution must meet the nearly insurmountable burden of proving that nothing which followed in its investigation -- including even the fact that the person who gave the statement became the target of the investigation -- flowed from that statement.

Since no criminal charges are to be brought, the Commonwealth will not be required to litigate the question of whether the prosecution of any of the participants is effectively precluded because of "taint" flowing from allegedly coerced statements. It appears to us, however, that, had charges been brought, taint could have presented problems of varying degrees with respect to all persons involved in the incident, except the Mayor. Some specifics follow.

Shortly after the confrontation, homicide detectives took statements from many officers who had been at the scene. Some of these interviews were preceded by a notification that the officer was required to give a statement. At about this same time, Sambor issued the first of two orders to the Police Department directing full cooperation with the investigation then in progress. A second order to this effect was subsequently issued in July, 1985. Further, City attorneys representing the Police Department advised Police Department supervisors to direct their subordinates to cooperate with the initial homicide unit investigation.

Not one of these pre-interview directives, orders or introductory statements explicitly threatened dismissal in the event of non-cooperation or mentioned City Charter §10-110, which states that any City officer or employee who refuses to appear or to testify before any court or authorized body shall forfeit his office or position. It might nevertheless have been argued, however, that a coercive atmosphere existed rendering involuntary and inadmissible the statements given by the police officers. Indeed, at least one officer who appeared before the MOVE Commission publicly stated that he so appeared, without invoking any privilege, because of threats that he would be fired if he exercised his constitutional right to remain silent.

Later events might also have been cited to support a conclusion of "taint" as to not only the police but also others involved in the incident. For example, on June 19, 1985, the

Mayor issued an Executive Order pledging or directing cooperation with the MOVE Commission. In pertinent part, that order stated:

All employees within the Executive and Administrative branch of City government are hereby directed to fully cooperate with the Commission by promptly producing documents, records, files and any other information that the Commission may request. In addition, these employees, on request of the Commission, shall be available to meet with, be interviewed by, and testify before the Commission during its hearings.

This directive's strong language could serve as at least the basis for a defense claim of coercion even in the absence of an explicit threat of dismissal or an explicit reference to the pertinent City Charter provision.

If criminal charges were being brought, numerous other events would doubtlessly be cited and arguments asserted by defense attorneys in support of the conclusion that legal "taint" precluded prosecution of their clients. This possibility is not mentioned by way of explanation with respect to the lack of charges, but rather to illustrate the foolishness of permitting a grand jury investigation to be preceded by an official public inquiry such as that which was here undertaken by the MOVE Commission. Were charges warranted in our view, they would have been brought by us and any allegations of taint would have been dealt with in the proper legal forum.

One additional legal matter should also be briefly noted. A 1973 change in the law of this Commonwealth has precluded a possible theory of liability on the part of the Mayor and other high

City officials. We raise this matter to permit consideration of whether a legislative change is warranted.

Specifically, we have considered whether the Mayor's initial failure to act, and his subsequent imprudent acts, might possibly rise to the level of misfeasance, malfeasance or nonfeasance. These three common-law criminal offenses involve either the breach of a positive statutory duty by a public official, or the performance by a public official of a discretionary act with an improper or corrupt motive. Under present statutes, however, they can no longer be prosecuted as crimes.

Were these still crimes, we would have been able to consider whether one or more of these charges might be warranted. In that event, it could prove significant that, under the Home Rule Charter, the Mayor is "responsible for ... law enforcement within [the City's] boundaries" (Article IV, Chapter 1, §4-100). Thus, in his handling of MOVE, it could be argued that Mayor Goode breached his duty of responsibility for law enforcement in the City. In contrast, of course, it could be argued that his various decisions were proper discretionary acts. If that were the case, criminal liability would only attach if an improper or corrupt motive could be established.

Resolution and consideration of any or all of the issues raised by the offenses of misfeasance, malfeasance and nonfeasance is unnecessary since the Crimes Code explicitly abolished all common-law crimes (18 Pa.C.S.A. §107(b)). The legislature, however, may wish now to consider the codification and resurrection

of these crimes in order to insure the greater future accountability of City officials. We recommend that they do.